UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

DAVID W. LANDRY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-293-B***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Supplemental Security Income ("SSI") appeal raises the issue of whether substantial evidence supports the commissioner's determination that the plaintiff, although prevented by back disorders from performing either his past relevant work or the full range of light work, is capable of making an adjustment to light work that exists in significant numbers in the national economy, including cashiering and clerical work. I recommend that the decision of the commissioner be vacated and the cause remanded for further proceedings.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from

[1]This action is properly brought under 42 U.S.C. § 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on June 16, 2000, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

disorders of the back and pain in the low back, right leg and knee, conditions that were severe but did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 2, Record p. 22; that his statements concerning his impairments and their impact on his ability to work were not entirely credible, Finding 3, Record p. 22; that he lacked the residual functional capacity ("RFC") to lift and carry more than twenty pounds or more than ten pounds on a regular basis or do more than occasional climbing, stooping, crouching or crawling, and needed to limit his reaching, Finding 4, Record p. 22; that the plaintiff was unable to perform his past relevant work as a woods worker, Finding 5, Record p. 22; that his capacity for the full range of light work was somewhat diminished by his inability to climb, stoop, crouch or crawl on more than an occasional basis and by his limitation on reaching, Finding 6, Record p. 22; that, given his age (46), education (high school) and previous work experience (semi-skilled but not transferable), application of Rule 202.21 of Table 2, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") would direct a conclusion of "not disabled," Findings 7-10, Record p. 22; and that, although the plaintiff was unable to perform the full range of light work, he was capable of making an adjustment to work that existed in significant numbers in the national economy, including employment as a cashier and a clerical worker, and that he therefore was not disabled at any time through the date of decision, Findings 10 [sic]-11, Record pp. 22-23. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the commissioner, 20 C.F.R. § 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson*

v. Perales, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge in this case reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. § 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff identifies two errors: that neither the administrative law judge's RFC assessment nor her ultimate finding of non-disability is supported by substantial evidence of record. *See generally* Statement of Specific Errors ("Statement of Errors") (Docket No. 3). I agree that the ultimate finding of disability lacks such support.

I. Analysis

This is a case that at first blush appears entirely straightforward: The administrative law judge embraced the RFC ascribed to the plaintiff by his own treating physician, Dr. Husted, and then asked a vocational expert at the plaintiff's hearing, Sharon Greenleaf, whether a person with such an RFC could perform any work in the national economy. *See* Record pp. 20-21 (decision), 56-57 (colloquy with Greenleaf). Greenleaf responded that such a person could perform clerical or cashiering work. *Id.* at 57.

Counsel for the plaintiff nevertheless insisted at oral argument that the plaintiff could not possibly have performed those jobs. There is indeed a glitch. The administrative law judge had (no doubt inadvertently) omitted to mention to Greenleaf several of the limitations contained in the Husted RFC namely, limitations on the

plaintiff's reaching, handling, pushing and pulling. *Compare* Record p. 309 (Husted RFC) *with id*. at 56-57 (administrative law judge's description to Greenleaf of Husted RFC). Counsel for the commissioner contended at oral argument that this was harmless error; however, a review of the definition of "Cashier II" in the Dictionary of Occupational Titles suggests otherwise. *See* Dictionary of Occupational Titles § 211.462-010 (4th ed. 1991) (physical demands of Cashier II job include frequent reaching, handling and fingering). It is in any event impossible to know whether, had Greenleaf been accurately informed of the scope of the Husted RFC, her answer would have changed. *See Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (administrative law judge must "accurately transmit the clarified output to the [vocational] expert in the form of assumptions.").[2] Without such accurate transmission, confidence in the reliability of the vocational expert's opinion is undermined.

II. Conclusion

The commissioner's determination that the plaintiff is capable of making an adjustment to light work that exists in significant numbers in the national economy is not supported by substantial evidence of record. Accordingly, I recommend that the

[2] Other arguments identified in the plaintiff's Statement of Errors are not compelling. The administrative law judge did not overlook significant limitations on his ability to sit and stand. *See* Statement of Errors at [1]-[4]. Rather, she credited Dr. Husted's RFC findings and accurately described that component to Greenleaf. *Compare* Record pp. 56-57 (colloquy with Greenleaf) *with id*. at 307 (Husted RFC). Nor did the administrative law judge err in rejecting Greenleaf's answers to hypothetical questions that incorporated the plaintiff's own testimony regarding his limitations. *See* Statement of Errors at [4]-[6]. With respect to at least one of those claimed conditions (blurry vision), there was as the plaintiff's counsel acknowledged at oral argument no evidence of record that it stemmed from a medically determinable impairment. Such alleged conditions rightfully are ignored. *See, e.g.*, Social Security Ruling 96-7p, *reprinted in West's Social Security Reporting Service*, Rulings 1983-1991 (Supp. 1999-2000), at 136 ("If there is no medically determinable physical or mental impairment(s) . . . the symptoms cannot be found to affect the individual's ability to do basic work activities.").

decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 19th day of June, 2000.

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David M. Cohen
United States Magistrate Judge

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 99-CV-293

LANDRY v. SOCIAL SECURITY, COM Filed: 12/23/99
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Dkt# in other court: None

Cause: 42:405 Review of HHS Decision (SSID)

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